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Supreme Court, U.S.
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No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1988

LIBERTY MOBILEHOME SALES, INC.,
Appellant,

v.

STEPHEN EAMIELLO, ET UX.,
Appellees.

ON APPEAL FROM THE SUPREME COURT
OF CONNECTICUT

JURISDICTIONAL STATEMENT

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List of Corporate Affiliates

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I. QUESTIONS PRESENTED

I. Whether the Connecticut Supreme Court erred in finding that Connecticut General Statute §21-79 does not effect a taking of Petitioner's property without just compensation in violation of the takings clause of the Fifth Amendment as applied to the states through the Fourteenth Amendment to the United States Constitution?

A. Whether the Connecticut Supreme Court erred in finding that Conn. Gen. Stat. §21-79 does not effect a physical occupation taking of petitioner's property without just compensation?

B. Whether the Connecticut Supreme Court erred in finding that Conn. Gen. Stat. §21-79 does not effect a regulatory taking of petitioner's property without just compensation?

II. LIST OF ALL PARTIES

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IV. OPINIONS BELOW

The opinion of the Connecticut Supreme Court entered August 16, 1988, and the opinion of the Connecticut Superior Court, Judicial District of Waterbury, Housing Session, are set out in the Appendix hereto. See Eamiello v. Liberty Mobilehome Sales, Inc., 208 Conn. 620, 546 A.2d (1988); Eamiello v. Liberty Mobilehome Sales, Inc., No. 85-03177, (Connecticut Superior Court, Judicial District of Waterbury, August 31, 1987)

V. STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Connecticut was made and entered on August 16, 1988 and a copy thereof is appended to this statement in the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2). This action draws in question the validity of Conn. Gen. Stat. §21-79 on the grounds that it effects a taking of private property without just compensation in violation of the takings clause of the Fifth Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment. The federal constitutional question was timely raised in the trial court, as further described in the Statement of the Case, infra. The Connecticut Supreme Court also decided the constitutional question.

VI. CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V.

United States Constitution

In pertinent part: ". . . nor shall private property be taken for public use, without just compensation."

Amendment XIV

United States Constitution

§1 Citizenship rights not to be abridged by States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VII. STATUTES INVOLVED

Conn. Gen. Stat. §21-79. OWNER PROHIBITED FROM RESTRICTING RESIDENT'S RIGHT TO SELL.

(a) No owner or operator of a mobile manufactured home park shall require a resident who owns a mobile manufactured home which is safe, sanitary and in conformance with aesthetic standards to remove the home from the development at the time such mobile manufactured home is sold or a mortgage on such a home is foreclosed provided that the purchaser or foreclosing mortgagee shall assume and be bound by the rental agreement of the foreclosed mortgagor and shall be bound by the rules and regulations of the park.

(b) A mobile manufactured home shall be presumed to be safe and sanitary if it is established that the mobile

manufactured home was constructed in accordance with any nationally recognized building or construction code or standard. Failure to meet any such standard or the provisions of any such code shall not automatically raise a presumption that the mobile manufactured home is unsafe or unsanitary. Such failure shall not be used as a reason for withholding approval of an on-site sale unless such failure renders the mobile manufactured home unsafe or unsanitary.

(c) The owner of a mobile manufactured home park shall bear the burden of showing that a mobile manufactured home is unsafe, unsanitary, or fails to meet the aesthetic standards of the development. No aesthetic standard concerning those physical characteristics such as size, original color or original

building materials, which cannot be changed without undue financial hardship to the resident, shall be applied against a mobile home.

(d) Any purchaser of a mobile manufactured home sold by a resident may become a resident of the mobile manufactured home park provided he meets the entry requirements for said park and such requirements are equally applied by the owner to all purchasers and prospective residents and the owner approves such entry. Such approval may not be withheld except for a good cause. For the purposes of this section good cause means a reasonable cause for the owner to believe (1) that such purchaser intends to utilize the purchased mobile manufactured home for an illegal or immoral purpose or for any purpose that

would disturb the quiet enjoyment of the other residents of the park or (2) that the purchaser is or will be financially unable to pay the rent for the space or lot upon which the purchased mobile manufactured home is located. If the owner denies approval to a purchaser, he shall, in writing, state any reason for such disapproval. Such statement shall be delivered to the resident and the purchaser or prospective resident within ten days after the owner receives the completed application of the purchaser or prospective resident. Failure to deliver such notification within ten days shall be deemed to be approval.

(e) Any resident wishing to sell his or her home shall request a written statement of the owner's intentions regarding the condition of the home.

Within twenty days after receipt of such a request, the owner shall approve the home's condition for resale or deliver a written statement to the resident specifying the reasons why the home is not safe, sanitary, or in conformance with aesthetic standards. Failure of the owner to response within twenty days shall be deemed to be an approval of the home's conditions for resale. If the resident disputes the owner's response, he may seek a declaratory ruling from the department of consumer protection. The resident may attempt to correct defects identified by the owner and may again request the owner's approval of the home's condition for resale. If the resident again disputes the owner's response, he may once again seek a declaratory ruling from the department. An owner's statement of

approval shall remain in force for not more than six months. No owner shall exact a commission or fee with respect to the price realized by the seller, unless he has acted as agent for the seller in a sale pursuant to a written contract, or charge a rent for the mobile manufactured home space or lot upon which the purchased mobile manufactured home is located greater than the prevailing rent for any other space or lot located in the park.

Conn. Gen. Stat. §21-80(b):

(1) Notwithstanding the provisions of section 47a-23, an owner may terminate a rental agreement or maintain a summary process action against a resident who owns his mobile manufactured home only for one or more of the following reasons:

(A) Nonpayment of rent, utility charges or reasonable incidential services charges;

(B) Material noncompliance by the resident with any statute or regulation materially affecting the health and safety of other residents or materially affecting the physical condition of the park;

(C) Material noncompliance by the resident with the rental agreement or with rules or regulations adopted under section 21-70;

(D) Failure by the resident to agree to a proposed rent increase provided the owner has complied with all provisions of subdivision (5) of this subsection; or

(E) A change in the use of the land on which such mobile manufactured home is located, provided all of the affected residents receive written notice at least three hundred sixty-five days before the time specified in the notice for the resident to quit possession of the mobile manufactured home or occupancy of the lot.

(2) An owner may not maintain a summary process action under subparagraph (B), (C) or (D) of subdivision (1) of this subsection prior to delivering a written notice to the resident specifying the acts or omissions constituting the action or inaction complained of and allowing the resident twenty-one days in which to rememdy such complaint.

(3) Notwithstanding the provisions of section 47a-23, termination of any tenancy in a mobile manufactured home park shall be effective only if made in the following manner:

(A) By the resident giving at least thirty days' notice to the owner;

(B) By the owner giving the resident at least sixty days' written notice, which shall state the reason or reasons for such termination, except that, when termination

is based upon subparagraph (A) of subdivision (1) of this subsection, the owner need give the resident only thirty days' written notice, which notice shall state the total arrearage due provided, the owner shall not maintain or proceed with a summary process action against a resident who tenders the total arrearage due to the owner within such thirty days and who has not so tendered an arrearage under this subparagraph during the preceding twelve months.

(4) Except as otherwise specified, proceedings under this section shall be as prescribed by chapter 832.

(5) Nothing in this subsection shall prohibit an owner from increasing the rent at the termination of the rental agreement if (A) the owner delivers a written notice of the proposed rent increase to the

resident at least thirty days before the start of a new rental agreement; (B) the proposed rent is consistent with rents for comparable lots in the same park; and (C) the rent is not increased in order to defeat the purpose of this subsection.

(C) Notwithstanding the provisions of section 47a-35 and 47a-36, if judgment is entered in a summary process action against a mobile manufactured home owner and resident based upon subparagraph (D) of subdivision (1) of subsection (b) of this section, execution shall not issue until six months from the date of such judgment. The court shall condition such state of execution upon a requirement that the mobile manufactured home owner and resident make payments to the plaintiff in the summary process action in such installments as the court may direct for

the use and occupancy of the premises during the period of such stay at the rate for which such mobile manufactured home owner and resident was most recently liable as rent or in such greater sum as is reasonable in such installments as the court may direct.

VIII. STATEMENT OF THE CASE

The petitioner owns and operates a mobile home park. The respondents purchased a home in the park and rented the lot on which it sits. The petitioner has refused to permit the respondents to sell their mobilehome on its lot. Petitioner contends that Conn. Gen. Stat. §21-79 which authorizes the on-lot resale, effects a taking of private property without just compensation because it transfers to the mobile home owner a marketable right to the permanent occupancy of the park owner's land.

On August 29, 1980, the respondents purchased a used 1971 Newport mobile home from the petitioner for a price of Thirteen Thousand Four Hundred Fifty-Seven and 50/100 Dollars ($13,457.50), including

sales tax and title fees. The mobile home was purchased in place on lot #30 in Harmony Acres. On the date of purchase, the parties entered into a rental agreement for lot #30 for a term of 12-3/4 months from September 8, 1980 to September 30, 1981. At the time of purchase, respondents also received a copy of the park Rules and Regulations.

On September 30, 1981, the respondents' lease was extended to September 30, 1982 by a written addendum. This procedure was followed again on September 29, 1982, extending the lease to October 1, 1983. In September, 1983 the lease was extended to September 30, 1984 by a written addendum.

In accordance with the requirements

of the Supplemental Judgment in Liberty Mobilehome Sales, Inc. v. Town of Prospect, No. 106145 (Connecticut Superior Court, Judicial District of Hartford/New Britain, September 23, 1983) the requirements of the Supplemental Judgment were incorporated into the lease terms. On March 12, 1984, the respondents notified the petitioner that they were selling their mobile home. The petitioner notifed the respondents that they would not be permitted to sell their mobile home on site, for failure to comply with the resale requirements as set forth in the lease.

The respondents complained to the Connecticut Department of Consumer Protection, and on April 15, 1985, the Commissioner of that department issued a declaratory ruling that petitioner's

resale standards 1, 12, 16 and 17 contravened statutory provisions. The respondents moved out of the mobile home in June 1984, and since December 1, 1984, the respondents have refused to pay rent to the petitioner.

The trial court issued its Memorandum of Decision on August 31, 1987, and entered judgment for the respondents on the complaint. Eamiello v. Liberty Mobilehome Sales, Inc., No. 8503177, (Connecticut Superior Court, Judicial District of Waterbury) (August 31, 1987).

On September 16, 1987, the petitioner filed an appeal with the Appellate Court of the State of Connecticut. On December 7, 1987, the Connecticut Supreme Court transferred the Appellate Court appeal to itself pursuant to Section 4023 of the Connecticut Practice Book.

The parties argued the case on May 4, 1988, and the Connecticut Supreme Court issued its decision on August 16, 1988. Eamiello v. Liberty Mobile Home Sales, Inc., 208 Conn. 620, 546 A.2d 805 (1988).

The question presented by this appeal was first raised in the peitioner's Answer and Special Defenses dated July 17, 1985, specifically as follows:

> 7. Conn. Gen. Stat. §21-79 is unconstitutional as applied, as it deprives Liberty of the due process of law to which it is entitled as an owner of property under the U.S. and Connecticut constitutions."

The question was raised again in the petitioner's post-trial brief.

In ruling on the constitutionality of Conn. Gen. Stat. §21-79(a), the trial court rejected petitioner's contention that permitting the mobile home owner to resell his home on-site "amounts to an alienation on the ownership of real

estate." Memorandum of Decision, supra, p. 24. The court stated that the relationship between the mobile home owner and the park owner is a leasehold, and that the statute's restriction on evictions at the time of resale is a constitutional landlord-tenant law even if the lease has lapsed. Id.

The petitioner filed an appeal with the Appellate Court on September 16, 1987. Among the constitutional issues presented in the petitioner's brief was the following:

> V. Is Connecticut General Statutes Section 21-79(a) constitutional in that it amounts to an alienation of the ownership of real estate without due process of law?

On December 7, 1987, the Connecticut Supreme Court transferred the appeal to itself and the same question was presented for review. The Supreme Court of Connecticut heard oral arguments on May 4, 1988, and rendered a decision on August

16, 1988. The Connecticut Supreme Court held that:

> We conclude that §21-79 as applied to the facts of this case does not involve the actual physical occupation of land for a public purpose, but merely regulates the use to which private property may be put.

Eamiello, supra, 645.

> Section 21-79 strikes a reasonably fair balance betwen the economic interests of mobile home tenants and those of mobile home park operators.

Eamiello, supra, 620.

The petitioner now appeals to the Supreme Court of the United States.

IX. SUBSTANTIALITY OF THE QUESTIONS PRESENTED

The questions presented are so substantial as to require for their resolution plenary consideration, with briefs on the merits and oral argument, for the following reasons:

I. In Eamiello v. Liberty Mobilehome Sales, Inc., 208 Conn. 620, 546 A.2d 805 (1988), the Connecticut Supreme Court decided the question of whether Conn. Gen. Stat. §21-79 effects a taking of petitioner's property by physical occupation without just compensation in violation of the takings clause of the Fifth and Fourteenth Amendments to the United States Constitution. Its decision conflicts with this Court's decision in Loretto v. Teleprompter Manhattan CATV Corporation, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).

II. In Eamiello, supra, the Connecticut Supreme Court decided the question of whether Conn. Gen. Stat. §21-79 effects

a taking of petitioner's property by physical occupation without just compensation in violation of the takings clause of the Fifth and Fourteenth Amendments to the United States Constitution. Its decision conflicts with the decision of the Court of Appeals for the Ninth Circuit in Hall v. Santa Barbara, 833 F.2d 1270 (9th Cir.), reh. denied, 833 F.2d 1282 (9th Cir.), cert. denied, U.S. ,108 S.Ct. 1120, 99 L.Ed.2d 281 (1988).

III. In Eamiello, supra, the Connecticut Supreme Court decided the question of whether Conn. Gen. Stat. §21-79 effects a regulatory taking of petitioner's property without just compensation in violation of the takings clause of the Fifth and Fourteenth Amendments to the United States Constitution. Its decision conflicts with this Court's decision in Nollan v. California Coastal Com'n., U.S. , 107 S.Ct. 3141, 97 L.Ed. 2d 677 (1987).

This appeal presents a question of great public importance: whether a State

statute [1] authorizing the transfer from the owner of a mobile home park of what amounts to a fee simple determinable interest in his land to his tenant, the mobile home owner, constitutes a taking of property in violation of the takings clause of the Fifth Amendment, as applied to the states through the Fourteenth Amendment to the United States Constitution?

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1. At least four other states have statutory schemes similar to Connecticut. Cal. Civ. Code §798.73 (West 1982 & Supp. 1986); Florida Statutes §83.271 (renumbered as 83.69); Md. Code §8A-101-114 (1974, 1979 Cum. Supp.); Mass. Gen. Laws Ann. Ch. 140 §32 M. The California statute is discussed below. Infra, p. 40 . The Florida Supreme Court held that the Florida statute prohibiting evictions from mobile home parks except for good cause did not violate either the due process clause or the equal protection clause of the Fourteenth Amendment to the United States Constitution, Stewart v. Green, 300 So. 2d 889 (1979), but

The United States Supreme Court cases determining whether government action constitutes a taking fall under two lines of authority, regulatory taking cases and physical occupation cases. Where the regulatory action does not involve the physical occupation of property, the Court has "long recognized that land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'"

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also found that a park owner could terminate a tenancy after a substantial duration of not less than twelve months. Palm Beach Mobile Homes, Inc. v. Strong, 300 So.2d 881 (1974). The Maryland Court of Appeals held that the Maryland statute prohibiting evictions except for good cause and removal from the park upon resale did not constitute a taking. Cider Barrel Mobile Home Court v. Eader, 287 Md. 574, 414 A.2d 1246, 1251 (1980). However, the Cider Barrel court also based its ruling in part on its construal of the statute to permit a park owner to refuse

Nollan v. California Coastal Comm'n, U.S. , 107 S.Ct. 3141, 3151 97 L.Ed. 2d 677 (1987), citing Agins v. Tiburon, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980). See also Penn Central Transportation Co. v. New York City, 438 U.S. 104, 127, 98 S.Ct. 2646, 2660, 57 L.Ed.2d 631 (1978).

Where a permanent physical occupation has occurred, the Court has found a taking

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to renew an expired lease. Id. The Massachusetts Supreme Judicial Court held that the Massachusetts statute prohibiting park owners from preventing on-lot resales did not constitute a taking. Commonwealth v. Gustafson, 370 Mass. 181, 346 N.E.2d 706 (1976). However, the Gustafson court relied in part upon its interpretation of the Massachusetts statute to permit the park owner to require a tenant to give the park owner a first option to purchase a mobile home. Thus these courts have all upheld the constitutionality of similar statutes, but only by creatively construing them.

per se to the extent of the occupation. The Court has stated that:

> "[w]here governmental action results in '[a] permanent physical occupation' of the property, by the government itself or by others, see 458 U.S., at 432-433, n.9, 102 S.Ct., at 3174-3175, n.9, 'our cases uniformly have found a taking to the extent of the occupation without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner," Id., at 434-435, 102 S.Ct., at 3175-3176.

Nollan, 107 S.Ct., at 3145, quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).

The Loretto Court held that a physical occupation taking had occurred, despite the fact that the physical invasion authorized by New York City merely consisted of the erection by Teleprompter, a cable television company, of one and one half cubic feet of cable and switchboxes. Id.

I. The Connecticut Supreme Court's Decision Conflicts With This Court's Decision in Loretto v. Teleprompter Manhattan CATV Corp.

In the case below the Connecticut Supreme Court found that the challenged Connecticut statute "is not sufficiently analogous to a physical occupation of property to violate the takings clause as interpreted by the decisions of the United States Supreme Court." Eamiello, supra, 641. In making its determination, the court below chiefly relied on its interpretation of Loretto. Id., 641-643. Petitioner submits that the decision by the court below directly conflicts with the holding in Loretto that a permanent physical occupation of property authorized by the government requires compensation. In particular, the court below misapplied the criteria for establishing a physical occupation taking as set forth in Loretto

when it failed to find that the Connecticut statute works such a taking.

Chapter 412 of the Connecticut General Laws provides that no tenancy may be terminated for lapse of time and prohibits park owners from restricting a resident's right to sell on-site. The prohibition on terminating a tenancy for lapse of time coupled with the resident's unrestricted resale right operate to transfer the fundamental aspects of property ownership--the rights to possess, use and dispose of the property--from park owners to mobile home owners, and thereby effect a taking by physical occupation.

The Connecticut statute stops short of conveying the entire fee simple to the mobile home owner only because the property may revert to the park owner upon the occurrence of a certain contingency,

the closing of the mobile home park in order to change its use. Conn. Gen. Stat. §21-80(b)(1)(E). Should the park owner decide to go out of business altogether and change the use of his land, the reversion only happens after he first gives a one-year notice to quit and complete the eviction proceedings. Id. Thus, the statute in effect transfers to the tenant a fee simple determinable, an estate that ceases to exist only with the occurrence of a stated contingency. See Cribbet, Principles of the Law of Property, 42-45 (1975); 31 C.J.S. Estates Sec. 10; Burke, Connecticut Real Property Law, 268-262 (1984).

The court below sought to distinguish the effect of the Connecticut statute by arguing that the property owner in Loretto

was compelled by the City of New York to permit his land to be occupied for a use to which he never consented, the support of cables and switchboxes. Id. The court contended that although the Connecticut statute gives mobile home owners the right to perpetual occupancy of the park owner's land, the park owner has already consented to the occupancy of the site by the tenant's mobile home at the time when the tenant avails himself of the right to resell on-site under Conn. Gen. Stat. §21-79. Id. The court placed great emphasis on its contention that although the Connecticut statute compels the park owner to permit his land to be occupied perpetually, it only does so for a use to which he originally consented. Id. The court went on to note that Conn. Gen. Stat. §21-80(b)(1)(E) permits a park owner to use the land on which a mobile home

sits for a different purpose, provided he gives the lessee mobile home owner a year's notice prior to dispossession.

The Loretto Court, however, did not condition its finding of a physical occupation taking on the fact that the building owner never consented to the placement of the cables on her building. In fact, in 1970 the previous owner had granted the cable company permission to install a cable on the building before the New York statute was passed in 1973. Loretto, 458 U.S. 419, 102 S.Ct. at 3168-69, 73 L.Ed.2d 868. Despite the prior owner's consent to the same invasion as the City of New York later would compel, the Court nevertheless found a physical occupation taking. Furthermore, the Loretto Court noted that the building owner could avoid the law's compulsion to retain the cable installation by ceasing

to rent the building to tenants, much as the court below argued that the park owner is free to cease to rent lots for mobile homes if he changes his use of the land. 458 U.S. 439, 102 S.Ct. at 3178 n.17. The Loretto Court left no doubt that such an option made no difference to the existence of a permanent physical invasion. Id. The Court stated that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupancy." Id.

Nor do the other taking cases cited by the court below lend any support to its erroneous interpretation of Loretto. The court below cited Fresh Pond Shopping Center, Inc. v. Callahan, 464 U.S. 875, 104 S.Ct. 218, 78 L.Ed.2d 215 (1983), (Rehnquist, J., dissenting from dismissal for want of a substantial federal

question) for the proposition that this Court rejected an appeal challenging under the takings clause a municipal ordinance allegedly more burdensome to property owners than the Connecticut statute. Eamiello, supra, 644. The ordinance required property owners to obtain permission from the local rent control board in order to remove rent-controlled property from the rental housing market. Fresh Pond, supra. The property owner complained that the ordinance authorized the tenant to remain indefinitely. Id. This Court dismissed his appeal for want of a substantial federal question. Id.

The court below noted that Fresh Pond has limited value as an authority because the majority did not provide an opinion. Eamiello, supra, 644. See also Edelman v. Jordan, 415 U.S. 651, 671 (1974); Richardson v. Ramirez, 418 U.S. 24, 53

(1974). Fresh Pond, however, is clearly distinguishable from Loretto and the instant case. Unlike the ordinance in Fresh Pond, the ordinance in Loretto and the Connecticut statute authorize permanent occupancy of the property owner's land. The ordinance in Fresh Pond only eliminated the landlord's right to evict a tenant for purposes of demolition without first obtaining a removal permit. Under the ordinance, once all remaining tenants vacate the premises the property owner may then remove his building from the rental housing market. In contrast, the Connecticut statute permits the tenant to occupy his lot permanently and when he dies allows his estate to sell the perpetual leasehold interest. See Thompson v. Merlino Enterprises, 208 Conn. 656, 545 A.2d 1084 (1988). Like the New York ordinance in Loretto, the Connecticut

statute prevents the landlord from ever regaining control over his occupied property short of changing its use altogether.

Furthermore, the ordinance in Fresh Pond did not permit the tenant to sell his right to indefinite occupancy. On the other hand, the Connecticut statute transfers to the tenant the right to occupy the park owner's land permanently, and then authorizes the tenant to sell that right. Thus, contrary to the Connecticut Supreme Court's opinion, the Connecticut statute abrogates common law property rights far more onerously than did the Fresh Pond ordinance.

Nor does this Court's recent decision in F.C.C. v. Florida Power Corp., 480 U.S. 245, 107 S.Ct. 1107, 1109-13, 94 L.Ed.2d 282 (1987) support the Connecticut Supreme Court's failure to find a taking by

physical occupation as in Loretto. See Eamiello, supra, 644, citing F.C.C. v. Florida Power Corp. The question decided by the Court in Florida Power Corp., supra, is entirely different from the one at issue in Loretto and in the instant case. Florida Power Corp, supra, 1111. In Florida Power Corp., a public utility challenged a federal statute empowering the Federal Communications Commission to establish the rates chargeable by utility companies which have voluntarily entered into leases with cable companies renting space on utility poles for stringing television cable. This Court distinguished the effect of the federal pole statute from that of the New York City ordinance in Loretto, noting that:

> while the statute we considered in Loretto specifically required landlords to permit occupancy of their property by cable companies, nothing in the Pole Attachments Act as interpreted

> by the FCC in these cases gives cable companies any right to occupy space on utility poles, or prohibits utility companies from refusing to enter into attachment agreements with cable operators.

Id., 1112 (emphasis original). This Court then went on to explain in a footnote that it reserved the question of whether the government could compel a utility to renew a pole rental agreement. The Court noted that:

> [t]he language of the Act provides no explicit authority to the FCC to require pole access for cable operators, and the legislative history strongly suggests that Congress intended no such authorization. . . . [w]e do not decide today what the application of Loretto v. Teleprompter Manhattan CATV Corp. . . . would be if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements.

Id., 1112 n.6 (citation omitted). Florida Power Corp., then, dealt with the government's power to regulate the

landlord-tenant relationship with regard to rent, not with regard to the marketable right to permanent occupancy.[2]

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2. The Florida Power Corp Court also noted the utility's contention that

> it is a taking under Loretto for a tenant invited to lease at a rent of $1.15 to remain at the regulated rent of $1.79. But it is the invitation, not the rent, that makes the difference. The line which separates these cases from Loretto is the unambiguous distinction between a commercial lessee and an interloper with a government license.

Id., 1112.

The Connecticut Supreme Court seized upon this last line quoted, and from there apparently drew the erroneous conclusion that once a landlord consents to the initial occupancy of his property by a tenant, the government may authorize the tenant to occupy that property permanently without effecting a taking. Certainly, Florida Power Corp. does not stand for this proposition, nor does any other case decided by this Court. When read in its full context the point is clear, that once the tenant has been invited, the government may constitutionally regulate the rent he is charged.

II. The Connecticut Supreme Court's Decision Conflicts With the Decision of the Court of Appeals for the Ninth Circuit in Hall v. Santa Barbara.

The decision below also directly conflicts with the reasoning of the Court of Appeals for the Ninth Circuit in Hall v. Santa Barbara, 833 F.2d 1270 (9th Cir.), reh. denied, 833 F.2d 1282 (9th Cir. 1987), cert. denied, U.S. , 108 S.Ct. 1120, 94 L.Ed.2d 281 (1988). The Hall court relied on Loretto to find a physical occupation taking in circumstances nearly identical to those in the case at bar. Id. 1275-1280. In Hall, a mobile home park owner challenged a statutory scheme closely tracking that of Conn. Gen. Stat. §21-64 et seq. The statutory scheme consisted of a Santa Barbara ordinance and a California statute, which together required park

owners to offer their tenants leases of unlimited duration, terminable only for good cause, and to permit tenants to transfer their interests to new tenants. Id., 1273. The District Court in that case granted the City of Santa Barbara's Motion to Dismiss the park owner's complaint, which alleged that the Santa Barbara ordinance effected a taking of their property in violation of the Fifth Amendment to the United States Constitution. Id., 1273-74.

The Ninth Circuit reversed and found that the allegations of the complaint presented a claim for a taking by physical occupation as in Loretto and its precursors. Hall, supra, 1276.[3] The Ninth Circuit found that Loretto's explanation as to why a physical invasion

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3. The court remanded the case for further proceedings. Id. The United States Supreme Court denied certiorari. U.S. , 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988).

of property so seriously interferes with the property owner's rights strongly supported the Halls' taking claim, and quoted this passage from Loretto at length:

> Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.' United States v. General Motors Corp., 323 U.S. 373, 378 [65 S.Ct. 357, 359, 89 L.Ed. 311] (1945). To the extent that the government permanently occupies physical property, it effectively destroys each of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights. See Kaiser Aetna, 444 U.S., at 179-180 [100 S.Ct. at 392-93]; see also Restatement of Property §7 (1936). Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property. Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking, see Andrus v. Allard, [444

> U.S. 51] at 66 [100 S.Ct. 318 at 327, 62 L.Ed.2d 210], it is clearly relevant. Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.

Loretto, 458 U.S. at 435-36, 102 S.Ct. at 3176 (emphasis original; footnote omitted), cited by Hall at 1277.

Noting that "the right to occupy property in perpetuity is surely the type of interest that is protected by the taking clause," the Ninth Circuit observed that the Santa Barbara ordinance requires the park owner to give mobile home owners an indefinite lease, "a recognized estate in land." Hall at 1276. Coupled with the mobile home owner's right to sell the mobile home to a buyer of his choosing, the court found that the perpetual tenancy deprived the park owner of any "meaningful

say as to who will live on the property, now or in the future." Id.

Most importantly, the Hall court pointed to the ability of the mobile home owner to reap an economic windfall by selling his right to possess the property in perpetuity. Id. at 1276-77. The court found that the ordinance, as it allegedly operates, gives

> landlord and tenant complementary estates in the same land. On the one hand, the landlord loses forever a fundamental aspect of fee simple ownership: the right to control who will occupy his property and on what terms. On the other hand, the tenant gets an interest that he can liquidate and take with him when he leaves the property, or even the City of Santa Barbara.

Id. at 1279.

The court found unpersuasive the fact that mobile home owners may be removed for cause. Id. at 1277. As in Connecticut, so long as mobile home owners in Santa Barbara pay the rent and behave

themselves, they have an indefeasible right to possession. Id. The court was similarly unimpressed with the fact that the physical occupation was by mobile home owners rather than the government. The court stated that "'[a] permanent physical condition authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant.'" Id., quoting Loretto, 458 U.S. at 433 n.9, 102 S.Ct. at 3174 n.9.

The Hall court also found that the district court had to hear evidence on the question of whether the Santa Barbara ordinance substantially advanced a legitimate state interest. Id. at 1281. The court doubted whether the ordinance could advance the Santa Barbara City Council's avowed purpose of alleviating a critical shortage of low and moderate

income housing. Id. Taking the allegations as true, the court reasoned that the ordinance would merely grant a windfall to current mobile home owners at the expense of current park owners. Id. The court noted the allegation that the ordinance has resulted in a substantial increase in the prices of mobile homes. The court suggested that low-income families may have been hindered by the ordinance rather than helped in gaining access to mobile homes. Id.

Finally, the Ninth Circuit found that the district court had to hear evidence as to whether adequate compensation for the taking was paid to the park owner. Id. The court declared that, in order to determine whether adequate compensation was paid for the alleged transfer to each tenant of the park owner's possessory interest in the land, the lower court must

ascertain the value of the interest allegedly transferred to each tenant and the value of what the park owner received, if anything, in addition to normal rental payments. Id. The Ninth Circuit's position, then, is that rental payments compensate the park owner for use of the land during the rental period and for any amenities provided to tenants, but do not constitute compensation for the taking of property.

Although Hall is a case on all fours with Loretto, the court below rejected the Ninth Circuit's reasoning by arguing that neither the Connecticut statute nor the Santa Barbara ordinance work a taking by physical occupation as in Loretto:

> Unlike the Hall court, we conclude that the modification of the common law right of the lessor to absolute control over the term of the lease and the identity of his lessee effectuated by §21-79 in respect to mobile home parks is not sufficiently

> analogous to a physical occupation of property to violate the takings clause as interpreted by the decisions of the United States Supreme Court.

Eamiello, supra, 641. The Eamiello court's failure to distinguish F.C.C. v. Florida Power Corp., Fresh Pond Shopping Center, Inc., and Loretto is discussed above. The court below also suggested that significant differences exist between the Connecticut mobile home statutes and the Santa Barbara ordinance. Eamiello, supra, 641. However, with regard to the question of a physical occupation taking the court never explained what these differences might be, let alone their significance. Thus, the decision by the court below directly conflicts with the decision by the Court of Appeals for the Ninth Circuit over the question of what conditions give rise to a physical occupation taking as set forth in

this Court's decision in Loretto. Although due to the procedural setting of Hall the Ninth Circuit did not decide the issue on the merits, its conflict with the decision by the court below over the interpretation of Loretto, this Court's most definitive statement regarding physical occupation takings, is no less dramatic.

III. The Connecticut Supreme Court's Decision Conflicts with This Court's Decisions in Nollan v. California Coastal Com'n., Agins v. Tiburon, and Penn Central Transportation Co. v. New York City.

By misapplying the standard for the determination of whether the Connecticut statute works a regulatory ruling, the Connecticut Supreme Court's decision directly conflicts with the line of this Court's decisions employing the established taking standard. This Court recently stated that it has

> long recognized that land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land,' Agins v. Tiburon, 447 U.S. 255, 260 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980). See also Penn Central Transportation Co. v. New York City, 438 U.S. 104, 127, 98 .Ct. 2646, 2660, 57 L.Ed.2d 631 (1978) ("a use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose").

Nollan v. California Coastal Comm'n., 107 S.Ct. 3241, 3146 (1987).

Instead of determining whether the Connecticut Statute substantially advances legitimate state interests, the court below, misconstruing Penn Central, supra, stated that the test for

> whether an economic regulation violates the takings clause depends on the particular circumstances in that case and a balancing of the law's purpose against the extent to which it diminishes the value of private property.

Eamiello, supra, 646. Contrary to the

Connecticut Supreme Court's formulation, this Court's regulatory taking test is not a mere balancing test.

The Connecticut Supreme Court concluded that the statutory rights of a tenant to sell his mobile home on-site, "serves a substantial public purpose in protecting the economic interests of mobile home tenants in selling their homes on-site." Eamiello, supra, 648. The court found that the Connecticut statute protects mobile home tenants from being forced to sell to park owners at a substantial loss and thus benefits those who otherwise could not afford to purchase housing. Id. The court also noted that a task force commissioned by the Connecticut General Assembly found that the refusal by park owners to permit tenants to resell their mobile homes on-site prohibited the tenants from obtaining equity from their

housing investment. Id.

The court below erred in concluding that the statute has a substantial public purpose. Indeed, the statute does allow the mobile home owner to obtain equity in his mobile home. However, the equity built by the mobile home owner as a result of the statute is not based upon the value of the mobile home itself. Rather, by giving the mobile home owner the right to occupy his site permanently, the statute enables the mobile home owner to acquire equity entirely based upon the value of the park owner's land. Permitting one property owner to build equity in the land of another without any compensation is not a substantial public purpose.

The court below claimed that the Connecticut statute prevents mobile home owners from being forced to sell to park owners at a substantial loss. Apparently

the court had in mind the situation where, before the enactment of the statute, a park owner could require the mobile home owner at the termination of his lease to sell the mobile home only to a buyer who would relocate it to another site, or to the the park owner. Prior to the enactment of the statute granting the mobile home owner a permanent occupancy right, however, the mobile home owner did not suffer any such "loss", because he had not gained the valuable right to occupy the park owner's land permanently. The mobile home owner merely had a mobile home, the value of which depended on its characteristics and condition and the length of any lease for a home site. Thus, the value of the mobile home with a lease for a site in a park, and one without such a site differed solely as a function of the value of the leasehold.

Since the leases did not include a right to permanent occupancy, and the park owner could evict a tenant for lapse of time, the on-site value of the mobile home could not differ dramatically from its off-site value. The Connecticut statute changed that economic situation.

The enactment of the Connecticut statute granted an equity windfall to mobile home owners in the form of a legislative gift of the right to occupy the site permanently, and to sell that right along with their mobile homes. The statute also has the effect of granting to mobile home owners any appreciation in the value of the perpetual leasehold. Instead of protecting the mobile home owner's economic interest in the mobile home and the limited leasehold value, the Connecticut statute transfers wholesale the entire bundle of property rights to

the mobile home owner. No rational interpretation can construe the building of equity by the mobile home owner through such a transfer of property rights as either a legitimate or a substantial public purpose.

In the instant case it is undisputed that in 1980 the Eamiellos purchased a used 1971 mobile home from Liberty for $12,500.00 along with the right to rent a lot in Liberty's Harmony Acres Park. Eamiello, supra, 628, 648. Seeking to recover possession of its lot, in April 1984 Liberty offered to repurchase the mobile home for $12,500.00 but refused to permit the Eamiellos to resell on the lot to anyone else. Id. In October 1984 the Eamiellos received an offer to buy their mobile home on-site for $12,500.00. The mobile home at most had a value of $3,500.00 if the buyer could not rent a

lot from Liberty. Id.

It is abundantly clear then that the difference between the on-site value and the off-site value of the mobile home is the value of the right to permanent occupancy of Liberty's lot. It is also obvious that the value of the mobile home on-site increased between 1980 and 1984 due to the appreciation of the value of the permanent leasehold right. Liberty did refuse to allow the Eamiellos to sell on-site, but then offered to purchase the mobile home for its $12,500.00 original cost, not its off-site value. Thus, Liberty never tried to force the Eamiellos to sell at a substantial loss by taking advantage of the difference in the value of the mobile home off-site from its value on-site. Liberty's offer protected the Eamiellos' investment in their mobile home. However, Liberty was unwilling to

pay the Eamiellos for the appreciation in the value of the permanent occupancy right granted to mobile home owners by the Connecticut Legislature.

Permitting mobile home owners to build equity in their mobile homes by transferring to them the rights to possess, use and dispose of the park owners' land clearly does not constitute a legitimate or substantial public purpose. Arguably, in enacting the statute, the Connecticut Legislature also had a more limited legitimate public purpose in protecting the investments of individuals who purchased a mobile home along with the right to rent a lot for a limited time.

The Legislature could have requried the park owner to buy back a mobile home at the tenant's original purchase price. This price would reflect the intrinsic

value of the home and the value of the terminable lease. Petitioner does not concede that the limited protection of the value paid by the mobile home owner for the right to rent a lot for even a limited time would be a legitimate public purpose. However, it is quite clear that the Legislature could have narrowly tailored the statute to promote only its apparent purpose, the protection of the mobile home owner's original investment.

Assuming for the purposes of argument only that such a legislative purpose is legitimate, the effect of the Connecticut statute far exceeds this purpose. The Connecticut statute does not merely protect the mobile home owner's original investment which included the right to occupy a lot for a limited period. By transferring to the mobile home owner the

marketable right to permanent occupancy of the lot, the statute grants the mobile home owner the right to capture the value of the permanent, not just a limited leasehold right, and any appreciation of that value. Thus, the Connecticut statute is not tailored to achieve even such a limited legitimate purpose. In exceeding this purpose, the Connecticut statute effects a taking of the park owner's property without just compensation. The fact that the Connecticut statute may substantially advance a legitimate public purpose at the same time as it advances an impermissible public purpose does not make it any more constitutional than if the law

failed to advance its public purpose altogether.

CONCLUSION

For the reasons stated above, petitioner respectfully requests that this Court accept jurisdiction of this appeal.

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